Supreme Court, U.S.
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No. 00-86

IN THE

Supreme Court of the United States

LINDA KERSTETTER, Individually, and as Personal Representative and Heir of the Estate of David Joseph Huber,

Petitioner,

v.

PACIFIC SCIENTIFIC COMPANY, BEECH AIRCRAFT CORPORATION, RAYTHEON AIRCRAFT COMPANY, BEECH AEROSPACE SERVICES, INC. and RAYTHEON AEROSPACE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PACIFIC SCIENTIFIC CO., INC.

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit apply the correct rule of law with respect to "design feature"?

2. Are the circuit courts of appeal consistent in application of the criteria announced in *Boyle v. United Technologies Corp.*?

3. Can post-procurement conduct by the government be evidentiary of government approval of reasonably precise specifications?

4. Is the government contractor defense available to a subcontractor who manufacturers a sub-system pursuant to a prime contract with the government?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by the petitioner, Pacific Scientific Co., Inc. makes the following corporate disclosure statement. Pacific Scientific Co., Inc. is a wholly owned subsidiary of Danaher Corporation, a Delaware Corporation that is publicly held.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding and Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	2
I. The United States Court of Appeals for the Fifth Circuit correctly applied the criteria announced in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1998).	2
II. The circuit courts of appeal are consistent in the application of the criteria announced in *Boyle*.	4
III. Post-procurement conduct by the government can be evidentiary of government approval of reasonably precise specifications.	9
IV. A subcontractor to the primary government contractor is entitled to immunity under *Boyle*.	12
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Cases:

Boyle v. United Technologies Corp., 487 U.S. 500 (1998) ..... *passim*

Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir.), *cert. denied*, 510 U.S. 868 (1993) 7

Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988) 10, 11

Gray v. Lockheed Aeronautical Systems Co., 125 F.3d 1371 (11th Cir. 1997), *vacated on other grounds, Lockheed Aeronautical Systems Co. v. Gray*, 524 U.S. 924 (1998) 4, 5, 7

Harduvel v. General Dynamics Corp., 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990) 6

In re Air Disaster at Ramstein Air Base, Germany, 81 F.3d 570 (5th Cir.), *cert. denied sub nom., Chase v. Lockheed Corp.*, 519 U.S. 1028 (1996) 8

In re Joint Eastern and Southern District of New York Asbestos Litigation, 897 F.2d 626 (2d Cir. 1990) 5, 6, 7

Cited Authorities

	Page
Kleeman v. McDonnell Douglas Corp., 890 F.2d 698 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990)	8, 10
Lewis v. Babcock Industries, Inc., 985 F.2d 83 (2d Cir.), *cert. denied*, 509 U.S. 924 (1993)	11, 12, 13
McGuire v. Hughes Aircraft Corp., 725 F. Supp. 821 (D.N.J. 1989), *aff'd*, 912 F.2d 67 (3d Cir. 1990)	13
Nicholson v. United Technologies Corp., 697 F. Supp. 598 (D. Conn. 1988)	6
Ramey v. Martin Baker Aircraft Co., 874 F.2d 946 (4th Cir. 1989)	11
Stout v. Borg Warner, 933 F.2d 331 (5th Cir.), *cert. denied*, 502 U.S. 981 (1991)	7
Tate v. Boeing Helicopters, 140 F.3d 654 (6th Cir. 1998)	4, 7
Statute:	
28 U.S.C. § 2680	2

STATEMENT OF THE CASE

This case arises from the death of Navy Instructor Pilot Lt. David Joseph Huber, U.S.N., while conducting a familiarization flight with a student pilot off Padre Island National Seashore near Corpus Christi, Texas, in February, 1995. Lt. Huber was ejected from his aircraft during a training maneuver. Lt. Huber survived the initial ejection from the aircraft and made two radio calls indicating that he was in his parachute over the Gulf of Mexico. Lt. Huber came out of his parachute prematurely for unknown reasons and died from impact with the water. Pet. App. 20a.

Lt. Huber's mother, Linda Kerstetter, filed suit in Texas state court on August 30, 1996 against Beech Aircraft Corporation (the manufacturer of the aircraft), Pacific Scientific Co., Inc. (the manufacturer of the pilot restraint system), and Beech Aerospace Services, Inc. (the maintenance contractor for the aircraft). All defendants filed motions for summary judgment pursuant to the government contractor defense and the absence of summary judgment evidence sufficient to create a genuine issue of material fact. The district court heard argument on the motions three times in open court and once by telephone. The district court granted the motions for summary judgment on March 30, 1999 and thereafter entered a final judgment and issued an opinion on May 25, 1999. On April 18, 2000, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the district court.

REASONS FOR DENYING THE WRIT

I. The United States Court of Appeals for the Fifth Circuit correctly applied the criteria announced in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1998).

The government has immunity from tort liability when exercising a discretionary function. 28 U.S.C. § 2680. A government contractor is entitled to share in the government's immunity from liability where a judgment against the contractor would threaten a discretionary function of the government. *Boyle*, 487 U.S. at 512-13. Conflict sufficient to displace state law liability for design defects is present where a contractor contracts with the government to provide military equipment and when the United States approved reasonably precise specifications, the equipment conformed to those specifications and the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two criteria assure that the government considered the design feature in question so as to bring the suit within the discretionary function exemption to tort liability. *Boyle*, 487 U.S. at 512.

The Navy conducted an investigation after this accident. It found that if the rotary buckle on the pilot's restraint system was inappropriately placed in front of his life preserver it was possible for the control stick in the full aft position to contact the buckle. The Navy concluded that Lt. Huber's restraint harness was inadvertently released by probable contact with the aircraft's control stick during a spin recovery. Pet. App. 21a. The district court exhaustively reviewed the summary judgment evidence relative to the

detailed specifications concerning the aircraft's cockpit geometry, movement of the aircraft's control stick and the pilot restraint system. Pet. App. 34a-47a.

The petitioner argues that the "design feature" described in *Boyle* is equivalent to the "specific design defect" alleged by the petitioner; that is, the safety harness buckle's raised vanes, the curvature of the control stick and the shape of the stick handle. This is a variation of the argument petitioner unsuccessfully made below wherein she asserted that in order for the government contractor defense to apply, the government must have considered and rejected safer alternative designs or at least must have itself proactively limited the discretion of the contractor to include a safer alternative design. Pet. App. 7a, 8a. By equating "design feature" and "specific design defect" the petitioner seeks to avoid the defense unless the respondents carry the burden of establishing that the government considered the specific hazard alleged by the petitioner and went forward with the design anyway.

The formulation of defense petitioner advances has already been rejected by this Court in *Boyle*. Thus, this Court stated:

> We have considered the alternative formulation of the Government contractor defense, urged upon us by petitioner, which was adopted by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 747 (1985), cert. pending, No. 85-1529. That would preclude suit only if (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; *or* (2) the contractor timely warned

> the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design. While this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest embodied in the "discretionary function" exemption. The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.

Boyle, 487 U.S. at 513. *See also Tate v. Boeing Helicopters*, 140 F.3d 654, 658 (6th Cir. 1998) (*Tate II*) (government not required to focus on a particular hazard as opposed to particular design). By equating the "design feature" and "the specific defect alleged", the petitioner seeks to have this Court adopt the formulation of the rule it has already rejected in *Boyle*.

II. The circuit courts of appeal are consistent in the application of the criteria announced in *Boyle*.

The petitioner's assertion that a conflict exists within the United States Courts of Appeal in their application of the criteria of *Boyle* is illusory. The petitioner relies on *Gray v. Lockheed Aeronautical Systems Co.*, 125 F.3d 1371 (11th Cir. 1997), *vacated on other grounds*, *Lockheed*

Aeronautical Systems Co. v. Gray, 524 U.S. 924 (1998), and *In re Joint Eastern and Southern District of New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990) ("*In re Asbestos*"), to attempt to support her argument. As an examination of these cases illustrates, there is no conflict between the standards applied in the Eleventh and Second Circuits, and the standard applied by the United States Court of Appeals for the Fifth Circuit in this case.

Gray arose from the crash of a S-3 "Viking" jet aircraft after take off from an aircraft carrier. The plaintiff blamed the crash in part on design defects in the aircraft's aileron servo. Lockheed sought to avoid liability pursuant to the government contractor defense. Lockheed produced only a general narrative description of the servo's specifications and no engineering drawings. The district court held that the defense was unavailable because Lockheed presented no evidence that the Navy approved reasonably precise specifications for the servo and therefore failed to satisfy the first *Boyle* condition. *Gray*, 125 F.3d at 378.

In re Asbestos dealt with an application of the *Boyle* criteria to a failure to warn case. Eagle-Picher, a supplier of asbestos under a government contract for use as insulation on World War II Navy vessels, raised the government contractor defense as a bar to liability. Eagle-Picher alleged that the Navy issued instructions pertaining to the product's packaging, packing and labeling relating to container size, weight and quantity of contents. Eagle-Picher produced no evidence of warnings. Accordingly, there was no showing of governmental approval of reasonably precise specifications. *In Re Asbestos*, 897 F.2d at 629-31.

The court in *In re Asbestos* was acutely aware of the absence of government approval of reasonably precise specifications. The allegedly contrary result reached in *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598 (D. Conn. 1988) where the defense was held available was addressed as follows:

> Because the information brought forth by discovery [in *Nicholson*] conclusively established that the Government had exercised extensive control over both the original compilation of the landing gear's repair manual and the revisions, the court found sufficient, specific governmental control over the content of the warnings to satisfy the "reasonably precise specifications" element of *Boyle*.

In re Asbestos, 897 F.2d at 633. Thus, no conflict in fact existed based on the facts of the case.

Harduvel v. General Dynamics Corp., 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990), also decided by the Eleventh Circuit illustrates the lack of conflict. That case arose from the crash of an F-16 aircraft manufactured by General Dynamics. The plaintiff obtained a favorable jury verdict on allegations of a design defect relating to a "wire chafing" that led to a cockpit instrument failure. The Eleventh Circuit examined the evidence as it related to the *Boyle* requirements and held that General Dynamics had demonstrated that the government had approved reasonably precision specifications by, *inter alia*, conducting "an extensive review of the aircraft, including the electrical system, examining specifications, drawings and blueprints." *Harduvel*, 878 F.2d at 1320. The jury verdict was reversed and judgment entered for General Dynamics on the basis of the government contractor defense.

All of the case law cited consistently demonstrates that state tort law will only be displaced where the three part test set out in *Boyle* is met. In both *Gray* and *In re Asbestos*, the defendants failed as a matter of fact to establish that the United States approved reasonably precise specifications and the defense failed. The authority relied on by petitioner demonstrates only that evidence of government approval of reasonably precise specifications varies from case to case. The defense is permitted where supported by the evidence in the case. The holdings in *Gray* and *In Re Asbestos* therefore do not conflict with holdings in *Tate II*, 140 F.3d 654, *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir.), *cert. denied*, 510 U.S. 868 (1993), and *Stout v. Borg Warner*, 933 F.2d 331 (5th Cir.), *cert. denied*, 502 U.S. 981 (1991), cited by petitioner.

The petitioner's argument is also flawed because she seeks to artificially construct a situation where compliance with state tort law would not conflict with the requirements of the government contract. Pet. 14, 15. Such an analysis is not a predicate to application of the three part test described in *Boyle*. Rather, the first part of the *Boyle* analysis (whether the government approved reasonably precise specifications) determines whether a significant conflict with state tort law exists. Where, as in the instant case, the government approves reasonably precise specifications and the other parts of the *Boyle* test are met, state tort law is displaced.

Implicit in the petitioner's argument is a misunderstanding of government approval of "reasonably precise specifications" as contemplated by *Boyle*. Petitioner's assertion that the pilot restraint system was not designed to pre-existing government specifications is misplaced. *Boyle* requires only that the government approve reasonably precise

specifications. *Boyle*, 487 U.S. at 512. The specifications need not be prepared by the government in order for the government to approve them. The required approval may be shown where the government reviewed and approved specifications prepared by the contractor. Governmental approval of reasonably precise specifications is established when the evidence discloses that the government reviewed detailed drawings submitted by the contractor at various progressive stages of the design, participated in critical design reviews and conducted testing of prototypes for actual performance. *See In re Air Disaster at Ramstein Air Base, Germany*, 81 F.3d 570, 574-75 (5th Cir.), *cert. denied sub nom., Chase v. Lockheed Corp.*, 519 U.S. 1028 (1996); *Kleeman v. McDonnell Douglas Corp.*, 890 F.2d 698, 701 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990).

The petitioner's assertion that the "primary" evidence relied on to demonstrate government approval of the pilot restraint system did not depict the raised vanes is misleading. Pet. 8. The uncontroverted summary judgment evidence described the Navy design review process during which the Navy reviewed and approved all aircraft design drawings. The drawings, all of which are in evidence, depicted the curvature of the control stick, the shape of the stick handle and the buckle's raised vertical vanes, shown in cross section such that their height is demonstrated. Pet. App. 53a.

Finally, the selection and design approval by the government of the pilot restraint system in this case is not akin to the situation posited in *Boyle* where a federal procurement officer orders a standard piece of equipment off the shelf. *Boyle*, 487 U.S. at 509. Here government

engineers approved the inclusion of specific components after review of the detailed specifications and extensive testing and evaluation. Pet. App. 54a.

III. Post-procurement conduct by the government can be evidentiary of government approval of reasonably precise specifications.

The primary issue in most cases following *Boyle* has been whether the proponent of the defense has demonstrated that the government approved reasonably precise specifications. The petitioner argues that the Fifth Circuit erred by holding that post-procurement governmental evaluation was dispositive of the government contractor defense. Pet. 15. The petitioner asserts that the approval process must occur prior to procurement of the equipment. This argument is unsupportable for several reasons.

First, the petitioner's assertion that the Fifth Circuit permitted post-procurement governmental evaluation to be "dispositive" of the government contractor defense is in error. The Fifth Circuit decision is not dependent on post-procurement conduct. Rather, the Fifth Circuit held that there was evidence that the government was extensively involved throughout the approval process. Pet. App. 10a; *see also* Pet. App. 34a-47a.

Second, there is nothing in *Boyle* that requires governmental review and evaluation to cease at the time of procurement of the equipment. In fact, the petitioner's argument is at odds with the nature of the development and procurement of complex military equipment. As one court observed:

> . . . military hardware does not suddenly spring into being from initial design and procurement specifications, but evolves through drawings, blue prints and mockups agreed upon by the parties. [citations omitted] The ultimate design of the product is determined not only by the original procurement and contract specifications, but also by specific, quantitative engineering analysis developed during the actual production process.

Kleeman, 890 F.2d at 702. The petitioner's argument would freeze the governmental approval process at procurement. This does not take into account the reality of governmental procurement of complex equipment that may, and typically does, proceed through many specification revisions as a result of government evaluation and interaction with the contractor based on government experience with the equipment. Acceptance of the petitioner's argument that interaction in the approval process must stop at procurement would frustrate the policy announced by this Court of encouraging active contractor participation in the design process. *Boyle*, 487 U.S. at 513.

Third, the petitioner's assertion that the circuit courts of appeal are riddled with confusion on the issue of post-procurement conduct and its relationship to government approval of reasonably precise specifications is overstated. Pet. 20. In fact, the circuit courts of appeal have uniformly held that post-design and procurement conduct is evidentiary of government approval of reasonably precise specifications and the equipment's conformance to those specifications. In *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988), relied upon by the plaintiff in asserting that confusion exists, the evidence established that

the government had been using the rotor system alleged to be defective for twenty years before the accident that gave rise to the litigation. The length and breath of the Army's experience with the particular helicopter rotor system and the government's decision to continue using it after safety issues arose was held to be evidence of government approval. *Dowd*, 792 F.2d at 412.

An ejection seat mishap in an F-18 fighter aircraft was examined in *Ramey v. Martin Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989). There, a mechanic was injured while trying to remove an ejection seat. In *Ramey*, there was evidence that prior to the accident giving rise to the suit the Navy knew that there may be problems with removal of the ejection seat in the manner described in the Navy's maintenance manuals. The court held that the Navy's continued use of the component after its knowledge of potential design problems associated with the ejection seat was evidence of government approval.

The third case relied upon by petitioner, *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83 (2d Cir.), *cert. denied*, 509 U.S. 924 (1993), arose from an injury suffered by a military member after ejection from an F-111 aircraft. After delivery of the F-111s to the Air Force, the windshield of the aircraft was redesigned. The Air Force discovered corrosion of the ejection capsule cables after the redesign. An investigation was undertaken and in 1980 the Air Force determined that clips from the modified windshield were cutting the cable's protective coating thus permitting the corrosion. The Air Force made modifications to its maintenance manual adding cautions not to cut the cable, but did not redesign the windshield. The cause of the accident in 1987 was traced to corroded ejection module cables.

The plaintiff in *Lewis* specifically argued that the contractor could meet the governmental approval requirement of *Boyle* only during the design phase. The court held that the government's re-order of the cables after knowledge of alleged design defect uncovered in the 1980 investigation was evidence that the government approved reasonably precise specifications. *Lewis*, 985 F.2d at 89. In the instant case, there is evidence that ten years before the unfortunate accident involving Lt. Huber, the Navy was well aware of the potential for uncommanded seat harness release. Pet. App. 46a.

These cases simply do not demonstrate that the circuit courts of appeal are riddled with confusion. Each case holds that government conduct prior to the accident giving rise to the litigation is relevant to the issue of government approval of reasonably precise specifications. The government's decision, whether or not made post-procurement, to continue to use equipment after experience with the equipment has disclosed potential safety hazards is the exercise of discretion that is central to the scope of displacement of state tort laws adopted in *Boyle*.

IV. A subcontractor to the primary government contractor is entitled to immunity under *Boyle*.

The petitioner notes that Pacific was a subcontractor under the primary contract between Beech Aircraft Corporation and the government for the production of the aircraft at issue. Specifically, Beech subcontracted with Pacific to provide the pilot restraint system. In extending the government's tort immunity to government contractors, this Court was concerned that failure to do so would permit the financial burden of liability judgments against the

contractors to be passed through to the United States since the contractors would increase their contract prices to insure against the potential of judgment liability. *Boyle*, 487 U.S. at 511-12.

This policy is equally applicable to subcontractors or component suppliers. Were this not the case, plaintiffs would simply sue the subcontractors without joining the primary contractor. The costs associated with liability verdicts against subcontractors would be added to the cost of the subcontracts, thereby increasing the cost of the prime contract and thus frustrating the policy underlying the defense. This result, extending immunity to subcontractors, was reached in *McGuire v. Hughes Aircraft Corp.*, 725 F. Supp. 821, 825 (D.N.J. 1989), *aff'd*, 912 F.2d 67 (3d Cir. 1990) (subcontractor held entitled to the defense where it had no contract with the government and dealt only through the prime contractor); *see also Lewis*, 985 F.2d at 83-5 (a sub of a sub-contractor presented the defense).

CONCLUSION

The applicable law having been correctly applied by the United States Court of Appeals for the Fifth Circuit and there being no conflict within the circuit courts of appeal, respondent Pacific Scientific Co., Inc. respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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